No. 83-973

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in basing its affirmance of the method for computing retirement annuities of some Postal Service workers on a ground different from that argued by respondents.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 707 F.2d 548. The opinion of the district court (Pet. App. 36a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 50a) was entered on May 6, 1983. A petition for rehearing was denied on July 14, 1983 (Pet. App. 52a). On October 3, 1983, the Chief Justice entered an order extending the time to petition for a writ of certiorari to December 11, 1983. The petition was filed on Monday, December 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, the Office of Personnel Management (OPM) altered the method used to calculate the retirement benefits of substitute workers, or "part-time flexible" employees

(PTFs), of the Postal Service (Pet. App. 2a). The change diminished the expected annuities of some 113,000 future retirees (*ibid.*).

Congress first established the annuity system for postal employees in the Civil Service Retirement Act of 1920, ch. 195, 41 Stat. 614. That Act provided that the annuity would be calculated as a function of: (i) the number of years of federal service, and (ii) the average annual salary earned (Pet. App. 3a). Annuities for part-time employees, however, proved problematical because they worked far less than the time during which they had to be available for work (*id.* at 4a). Part-time employees had to be prepared to fill in as substitutes at all times, but were paid only when actually working for absent full-time employees.

In recognition of this situation Congress amended the Act in 1926 to provide that, for purposes of the annuity computation, postal substitutes were to be credited with a period of service that included their entire period of employment as substitutes, irrespective of the actual time worked. Act of July 3, 1926, ch. 801, § 5, 44 Stat. 907 (Pet. App. 4a-5a). Several years later another, and distinct, change was made by administrative practice rather than legislation. In accordance with a 1928 decision of the Comptroller General, subsequently adapted by the Secretary of the Interior to the computation of annuities (Pet. App. 5a), PTFs began to receive salary credit for pay not actually earned. The Secretary apparently reasoned that since substitutes were "subject to call" (*i.e.*, available for service) at times when they were not actually working, they should be credited for annuity purposes as if they had actually received salary during those times (*id.* at 7a-8a). Because of the perceived financial hardships confronting postal substitutes, PTFs thus received retirement benefits disproportionate to their contributions to the retirement fund.

In the ensuing 60 years Congress enacted several provisions affecting the postal workers' retirement system without ever focusing on the administrative practice of crediting substitutes for pay not actually earned. The 1956 Act reaffirmed the practice of crediting substitutes with periods of service in excess of time actually worked, but the Act did not address the related salary issue. Civil Service Retirement Act Amendments of 1956, ch. 804, SEC. 401 (§ 3(a)), 70 Stat. 745 (Pet. App. 5a). In passing the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, Congress removed postal employees from the competitive civil service but provided that they would still be covered by the civil service retirement system (Pet. App. 6a). OPM (the successor to the Civil Service Commission) therefore computed annuities for PTFs as had been done since 1928, including credit both for the entire period of service as a substitute, and for an annualized salary computed at the hourly rate at which substitutes were remunerated, rather than for the actual amount of salary received (Pet. App. 6a).

In January 1978, OPM changed its method of computing annuities to include only actual pay in determining substitutes' average annual salary (Pet. App. 6a). OPM made the decision at the behest of the Postal Service, which found that changes in the working conditions of substitutes had undermined the rationale for using the hypothetical full salary figure. The Postal Service concluded that unlike in the 1920's substitutes were now not "subject to call," partly because the 1975 collective bargaining agreement guaranteed PTFs a "tour of duty" of two or four hours per pay period, and partly because substitutes no longer needed to be available on such short notice (Pet. App. 9a).

2. In this action challenging OPM's decision to change the computation method, petitioner primarily alleged violations of the Postal Reorganization Act, the Fifth Amendment, and the Administrative Procedure Act (APA) (Pet.

App. 36a). The district court granted respondents' motion for summary judgment (*id.* at 36a-46a). It began by noting the reason for the change in the method of computation—that postal substitutes had not been "subject to call" since 1960 (*id.* at 37a). The court then held that the method of computation was not subject to collective bargaining, and therefore dismissed the Postal Reorganization Act claim (*id.* at 42a-46a). It also held that since the substitutes' annuity rights had not accrued or vested by the date OPM's change was implemented, the Fifth Amendment claim was not cognizable (*id.* at 40a-41a). Finally, the court found no merit to the APA claim, concluding that OPM's change in computation method was an interpretive rule exempt from the formal rulemaking requirements of the Act (*id.* at 41a-42a). See 5 U.S.C. 553(b)(A).

The court of appeals affirmed (Pet. App. 1a-35a). Although it agreed with the characterization of OPM's computational change as an interpretive rule (Pet. App. 21a-25a), the court of appeals proceeded to review the merits of the rule. It first held that in reviewing an interpretive rule, a court is free to substitute its own judgment for that of the agency charged with administering the statute (*id.* at 25a). The court proceeded to reject OPM's assessment that PTFs' right to an annuity based on the hypothetical salary figure turned on whether they were "subject to call" (*id.* at 26a). It nonetheless supported the computational change on the basis of its construction of the Civil Service Retirement Act, holding that Congress intended the "average pay" of a PTF to include only salary actually earned (*id.* at 28a-34a).

ARGUMENT

Petitioner argues that the court of appeals erred in deciding this case on the basis of its own understanding of the Civil Service Retirement Act, rather than allowing OPM,

the agency charged with administration and enforcement of the Act, to conduct further proceedings (Pet. 10-13). According to petitioner (*ibid.*), this failure violates the principle set forth in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). Petitioner also contends that the court of appeals departed from another accepted principle of administrative law, articulated in *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933), by refusing to defer to the agency's consistent practice of computing the salary component of retirement annuities on the basis of whether substitutes are "subject to call" (Pet. 13-18).

As we make clear below, there is no merit to either of these arguments about the deference due to agency action. This case thus ultimately involves a straightforward issue of statutory construction. On that question there is no division among the courts of appeals, and petitioner fails to demonstrate that the interpretation given to the Act by the court of appeals is incorrect. Moreover, even if the court's construction were erroneous, petitioner advances no reason why the agency's conclusion (that PTFs are no longer "subject to call")—accepted as correct by the district court—should not in any event be dispositive of its claims. Accordingly, further review is unwarranted.

1. Given the court of appeals' interpretation of the Civil Service Requirement Act, the principle announced in *SEC* v. *Chenery Corp.* has little to do with this case. It is true that OPM contended in the court of appeals that PTFs had no right to the inflated annuity they claimed, because they were no longer "subject to call." The court of appeals, by contrast, upheld OPM's action as required by a proper interpretation of the Act. Petitioner argues that the court of appeals, if it was not persuaded by the agency's justification for its action, should simply have reversed and awaited further proceedings by OPM.

But the court of appeals did not hold that the agency's determination (that PTFs were not "subject to call") was incorrect. Rather, it found that determination "immaterial" (Pet. App. 27a) in light of the statute's requirements—a point it correctly felt obliged to consider first. *Chenery* did hold (318 U.S. at 88) that

> [i]f an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

Here, however, the straightforward issue of statutory construction decided by the court of appeals was not "a determination of policy or judgment which the agency alone is authorized to make." Cf. *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, No. 82-799 (Nov. 29, 1983), slip op. 8 n.8 ("When an agency's decision is premised on its understanding of a specific congressional intent, * * * it engages in the quintessential judicial function of deciding what a statute means."). In performing the properly judicial task of determining congressional intent and interpreting the Act, the court of appeals concluded—as it was entitled to do—that the agency's action in recomputing PTF annuities was required by the statute.[1]

The court of appeals determined that "Congress did not intend for a PTF's 'average pay' to include pay which the

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[1]As both lower courts held (Pet. App. 22a-23a, 41a-42a), OPM's change in the method of computing retirement benefits was an interpretive rather than a legislative rule. The court of appeals thus was entitled to look afresh at any assumptions the agency may have made about the meaning of the Act. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

PTF never earned—neither on the basis of the employee's being 'subject to call' nor on any other basis" (Pet. App. 28a-29a). In reaching that conclusion the court relied first on the language of the Act itself. It provides that eligible employees in the classified civil service shall receive an annuity based upon their years of federal service and average pay (5 U.S.C. 8339). The Act defines "average pay" as "the largest annual rate resulting from averaging an employee's or Member's rates of basic pay in effect over any 3 consecutive years of creditable service" (5 U.S.C. 8331(4)). "Basic pay" is defined to include certain specified pay, excluding amounts such as bonuses, allowances, overtime pay, and military pay (5 U.S.C. 8331(3)).

From the legislative history the court of appeals concluded that Congress intended "basic pay" to include only pay actually earned (Pet. App. 29a-31a). The 1926 amendment to the Act is perhaps most instructive. Congress heard extensive testimony about the predicament of postal substitutes (Pet. App. 4a), and to ameliorate the plight of part-time employees it amended the retirement law to require that a substitute's credited service include the entire period of his employment as a substitute, regardless of the actual time worked. Yet Congress chose only to alter the period-of-service component of the annuity computation, and left the salary component intact. From 1926 to 1956 the Act provided that computation of the salary component was to include "the average annual basic salary, pay, or compensation * * * *received*" by the employee. Act of July 3, 1926, ch. 801, § 4, 44 Stat. 907 (emphasis added); Act of May 29, 1930, ch. 349, § 4, 46 Stat. 471; Act of Feb. 28, 1948, ch. 84, § 4, 62 Stat. 49. Although the term "received" was replaced by the phrase "basic pay" in 1956, sponsors of the 1956 Act made it clear that the new definitions were not intended to change the meanings of the previous terms unless so stated in the committee reports. See 102 Cong. Rec. 8655 (1956) (remarks of Sen. Johnston). And the Senate Report in fact

specified that "the annuities of all officers and employees * * * be based on an annual average of basic salary *received* * * *." S. Rep. 2642, 84th Cong., 2d Sess. 5 (1956) (emphasis added).[2] Thus the language of the Act, taken in conjunction with the legislative history, plainly indicates that the only favor Congress intended to confer on substitute postal employees in the computation of annuities was a relaxed calculation of their "period of service," not an expansion of the "salary" component of their annuity determination.[3]

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[2]Other provisions of the Act fortify the conclusion that the "basic pay" crucial to computation of annuities is limited to pay actually earned. For instance, the Act provides that each employing agency "should deduct and withhold 7 percent of the *basic pay* of an employee" for contribution to the retirement fund. 5 U.S.C. 8334(a)(1) (emphasis added). In addition, 5 U.S.C. 8342(h) refers to "[a]mounts deducted and withheld from the basic pay of an employee."

[3]Petitioner disputes the court of appeals' conclusion that the language of the Act is clear. It argues (Pet. 19 & n.11) that the term " 'average pay' * * * is defined as 'the largest annual *rate* resulting from averaging an employee's or Member's *rates of basic pay* in effect over any 3 consecutive years," and that "[a] 'rate' of pay * * * is not necessarily the amount of pay [an employee] actually receives." But the term "rate" is used in the Act's definition of "average pay" (5 U.S.C. 8331(4)) because "average pay" signifies the amount received *per year*, and a rate is "a quantity [or] amount * * * of something measured per unit of something else." *Webster's New Collegiate Dictionary* 950 (1981).

The provision in OPM's *Federal Personnel Manual* cited by petitioner (Pet. 19 n.11) does state that "the rate of annual basic pay—not the pay actually received by the employee—is to be used * * *." But the point of that statement is not to authorize computation of annuities based on amounts never earned. See Office of Personnel Management, FPM Supplement 831-1, Inst. 27, at 58 (May 15, 1978) ("For example, an employee whose annual basic pay is $8,000 but who is employed half-time would have a basic pay rate of $4,000 per annum."). It is rather intended to make clear that some amounts that *are* earned are nevertheless to be *excluded* from "basic pay." See 5 U.S.C. 8331(3) (basic pay "does not include bonuses, allowances, overtime pay, military pay, pay given in addition to the base pay of the position as fixed by law or regulation" etc.).

b. Neither is review warranted by petitioner's related claim—that the court of appeals improperly refused to defer to OPM's consistent practice in computing the salary component of annuities. This Court's decisions in *Norwegian Nitrogen Products Co.* v. *United States, supra*, and *Bank America Corp.* v. *United States*, No. 81-1487 (June 8, 1983), do not lay down a per se rule that agency practices of long standing are binding on the courts—only that such practices are entitled to respect, particularly when adopted contemporaneously with the enactment of a statute and supported by other indicia of congressional intent. This case presents no deviation from that principle in conflict with the decisions of this Court.

At the outset it is worth emphasizing the obvious: here, as was true in *Norwegian Nitrogen Products Co.*, the result reached by the court of appeals is consistent with that urged by OPM and the Postal Service, the agencies most directly concerned with the interpretation of the Civil Service Retirement Act in this area. The agencies argued in the court of appeals that PTFs were *no longer* deserving of special treatment in computing the salary component of annuities, because the justification for such treatment (that PTFs were "subject to call") no longer existed. The court simply concluded that Congress *never* intended to grant PTFs such special treatment. This is hardly the kind of judicial disrespect for agency practices that *Norwegian Nitrogen Products Co.* addressed.

Moreover, the former position of OPM—though it was one of long standing—was not adopted contemporaneously with the passage of the Act (Pet. App. 27a-28a n.9). Cf. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 412 n.11 (1979); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976). Contrast *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. at 315 ("[t]he practice has peculiar weight when it involves a contemporaneous

construction of a statute"). Nor, as the court of appeals found, did it spring from the responsible agency's independent determination of the demands of the Act (Pet. App. 5a). Rather, its principal source seemed to be a desire to achieve consistency with an earlier decision by the Comptroller General on another matter (*ibid.*). And unlike the administrative practice relied upon by this Court in *Bank America*, slip op. 9 & n.4, petitioner has cited no evidence that OPM's former practice was in any way reviewed or approved by Congress. See Pet. App. 5a-6a.

Finally, there is little merit to petitioner's argument that the court of appeals' interpretation of the Act unjustifiably ignores "postal substitutes' reliance throughout their working lives that their retirement benefits would not be reduced by a novel statutory construction" (Pet. 16). Petitioner does not here contend that PTFs have any right independent of the Act to annuity benefits bearing no relation to their earnings or contributions to the retirement fund. And the expectations of individual substitutes to which petitioner refers shed little additional light on the correct interpretation of the Act itself—the issue disputed by petitioner.[4]

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[4]The court of appeals did not indicate what effect its opinion was to have on employees who have already retired. That is a matter it presumably left for further proceedings. We are informed by OPM that it does not intend to seek recovery of payments already made under the prior system of computation. See 5 U.S.C. 8346(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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